In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-579

WILLIAM PRENTIS TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that 18 U.S.C. App. 1202(a) proscribes receipt of a firearm only by persons who have been convicted of violent felonies, and (2) that the seizure of a firearm from the front seat of his automobile, after it had been observed in plain view by an agent during a lawful search of the premises upon which the vehicle had been parked, was unlawful.

Following a non-jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on a one-count indictment charging the receipt of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a). He was sentenced to a term of two years' imprisonment, all but six months of which was suspended in favor of five years' probation. The court of appeals affirmed (Pet. App. 1a-3a).

The evidence at the hearing on the motion to suppress showed that on December 18, 1973, agents of the Federal Bureau of Investigation and of the Georgia Department of Investigation obtained a warrant to search for evidence of an illegal lottery operation at a house trailer occupied by Daisy Hughes (A. 17, 22).[1] They also obtained a warrant to search the person of petitioner, who had been seen at the trailer and who was expected to be there on the day the warrants were executed (A. 22-23, 30-32). During the search of the trailer, petitioner arrived in an automobile (A. 17-18). When he entered the trailer, an FBI agent identified himself and the other agents and informed petitioner that they had a warrant to search his person (A. 18). That search revealed several "check-up slips" (pieces of adding machine tape with figures that are normally returned to the lottery writers) (A. 18, 25, 33-34).

While petitioner was being searched, Agent McMichen of the Georgia Department of Investigation advised FBI Agent Beverstein that there was a revolver in the front seat of petitioner's automobile (A. 18). Agent Beverstein then called Assistant United States Attorney Almand and advised him that evidence of a lottery had been found on petitioner's person and that a firearm had been observed in petitioner's automobile. Almand informed Beverstein that petitioner was a convicted felon and that possession of the firearm by him was a criminal violation (A. 18-19). Beverstein then looked into the automobile, observed the revolver on the front seat, opened the locked door with a key taken from petitoner during the search of his person, and seized a loaded .38 caliber Smith and Wesson revolver (A. 19-20, 37).

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[1] "A." refers to the appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

At trial, the government introduced evidence that petitioner had been convicted in 1943 and 1961 of conspiracy to violate the Internal Revenue Liquor Laws and in 1956 of possession of an illicit liquor distillery (A. 48-49, 79).

1. Petitioner contends (Pet. 8-14) that 18 U.S.C. App. 1202(a) applies only to those convicted of violent felonies. However, the statute applies by its terms to "[a]ny person who—(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * ." "Felony" is defined as "any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less" (18 U.S.C. App. 1202(c)(2)). There is no foundation for petitioner's contention that this plain language should be ignored.

2. Petitioner contends (Pet. 4-8) that the warrantless seizure of the firearm from his automobile was unreasonable under the Fourth Amendment. The court of appeals rejected the contention, stating (Pet. App. 3a): "The gun was in plain view on the front seat of appellant's car; under the circumstances here a warrantless search was lawful."

"It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence" (*Harris* v. *United States*, 390 U.S. 234, 236). The agents here observed petitioner's firearm on the front seat of his automobile while it was parked on the premises of a house trailer that they

were authorized by warrant to search. The lawful observation of the firearm, coupled with the reliable information that petitioner was a convicted felon, gave the agents probable cause to seize the weapon as evidence of a crime committed in their presence.

Petitoner argues, however, that the agents should have obtained a warrant before entering his automobile to seize the gun. Even if "plain view" alone is not an answer to that contention (see *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (plurality opinion)), we submit that entering the vehicle without a warrant to seize the firearm lying on the front seat was justified under the "automobile exception" to the warrant requirement and was reasonable under the Fourth Amendment.[2]

It may have been possible, of course, for the agents to immobilize the vehicle and to secure a warrant. But that immobilization would itself have been a seizure under the Fourth Amendment; and this Court recognized in *Chambers* v. *Maroney*, 399 U.S. 42, 52, that, whenever a warrantless seizure of an automobile is justified, a warrantless search of the vehicle is also justified:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[2]Our views concerning the applicability of the "automobile exception" in circumstances similar to those in this case are set forth more fully in our petition for a writ of certiorari in *United States* v. *Bradshaw*, No. 73-1809, certiorari denied, October 21, 1974, a copy of which we are furnishing to petitioner's counsel.